



University of Connecticut  
**OpenCommons@UConn**

---

Faculty Articles and Papers

School of Law

---

1988

## Review, Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833-1986

Richard Kay

Follow this and additional works at: [https://opencommons.uconn.edu/law\\_papers](https://opencommons.uconn.edu/law_papers)



Part of the [Legal History Commons](#)

---

### Recommended Citation

Kay, Richard, "Review, Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833-1986" (1988).  
*Faculty Articles and Papers*. 499.

[https://opencommons.uconn.edu/law\\_papers/499](https://opencommons.uconn.edu/law_papers/499)

## BOOK REVIEW

**IMPERIAL APPEAL: THE DEBATE ON THE APPEAL TO THE PRIVY COUNCIL, 1833-1986.** By David B. Swinfen. Manchester (Lancashire): Manchester University Press, 1987. 268 pp. £35.00.

*Reviewed by Richard S. Kay\**

Consider the following three, apparently very different, cases.

The Indian Overseas Corporation of Calcutta, India contracted to sell 21,000 metric tons of salt to Mumtazzudin & Sons of Bangladesh. The buyer financed the purchase with Atlas Enterprises of Singapore. When the salt was loaded on the *Jag Dhir*, the carrier issued bills of lading to the seller who forwarded them to Atlas, the financier. Atlas, in turn, endorsed the bills to the Chhabra Corporation. After the *Jag Dhir* arrived in Bangladesh, the ship's master improperly released the goods to the buyer. Chhabra brought an action in admiralty against the shipowner in the High Court of Singapore. It recovered a judgment but on appeal to the Singapore Court of Appeals, the amount of damages was reduced. On further appeal it was held that the Court of Appeals had erroneously based its damage calculations on the extent of Atlas's losses instead of on the market value of the cargo. Since, however, there had been no competent proof of market damages, the award was upheld.<sup>1</sup>

Jai Chand met Sheila Maharaj in the shoe factory in Fiji where they both worked. They moved in together and a child was born. Maharaj became Chand's *de facto* wife. In 1973, to provide a home for his family, Chand secured a long-term lease on property owned by the Fiji Native Land Trust. In 1980 Chand left Maharaj and the property but told her she could remain in the house. In March, 1981, however,

---

\* Professor of Law, University of Connecticut School of Law.

1. Chhabra Corp. v. Jag Shakti, [1986] 1 All E.R. 480 (P.C.) (Singapore).

he served her with a notice to quit the premises. In the Supreme Court of Fiji the trial judge held that Chand was estopped by his prior actions and representations from denying Maharaj's right to occupy the property. The Fiji Court of Appeals reversed, holding that the Fiji Land Trust Act invalidated any "dealing" with interests in the property without the consent of the Native Land Trust Board. On further appeal, however, the trial court's judgment was reinstated and it was held that the Act's prohibition did not extend to the kind of personal license created by the estoppel in this case.<sup>2</sup>

Lalchan Nanán was charged with the murder of his wife, Eileen. He was tried before a jury of twelve in the Supreme Court of Trinidad and Tobago. When the foreman of the jury was asked whether the jury had reached a unanimous verdict he replied that they had and that they had found the accused guilty. Nanán was sentenced to death. The next day the foreman informed the registrar of the Court that, in fact, the jury had divided eight to four on the question of Nanán's guilt, that the jurors had not understood that they all had to agree, and that he had not known what the word "unanimous" meant. Nanán filed a motion in the High Court to have the verdict declared invalid. The court denied the motion holding that it could not consider evidence of what was said in the jury room. The Trinidad and Tobago Court of Appeal affirmed. A further appeal was dismissed in which it was agreed that the evidence of jury misunderstanding was inadmissible and that, for the same reason, there could be no proof that Nanán had been deprived of liberty without due process of law in violation of section 4(a) of the Constitution of the Republic of Trinidad and Tobago.<sup>3</sup>

The final judgments on appeal in all of these cases, cases each originating in a sovereign and independent state, were rendered in the same court. Each was argued, decided and announced in London by a bench consisting almost entirely of senior English judges.<sup>4</sup> These varied instances of international adjudication evidence the remnants of the jurisdiction of the great imperial court of the British Empire, the Judicial Committee of the Privy Council. Most observers believe the kinds of cases described will become increasingly rare and that the judicial functions of the Privy Council will, like the other artifacts of empire, eventually disappear. In *Imperial Appeal: The Debate on the Appeal*

---

2. Maharaj v. Chand, [1986] 3 All E.R. 107 (P.C.) (Fiji).

3. Nanán v. The State, [1986] 3 All E.R. 248 (P.C.) (Trinidad and Tobago).

4. The judgment in *Maharaj* was delivered by Sir Robin Cooke, President of the New Zealand Court of Appeal.

to the Privy Council, 1833-1986, David Swinfen has meticulously traced the decline of the Judicial Committee and the futile attempts to save or transform it. As is often the case with historical anomalies, it makes a fascinating story.

Ironically, appeals to the Privy Council from overseas territories originated in another anachronism. This was the authority of the king as the source of all justice and his consequent ability to grant relief outside of and beyond that offered by the regular court system. This royal authority was exercised in such well-known "prerogative courts" as the Court of Star Chamber and the Court of High Commission, which governed ecclesiastical matters. These courts were substantially abolished with the constitutional settlement of the Seventeenth Century, but appeals to the king in council from errors committed by colonial courts were maintained and, in terms of volume of business, just beginning to assume importance.<sup>5</sup> The prerogative nature of the Privy Council appeals accounts for some of its peculiar features: it always phrases its judgments in terms of recommendations to the monarch and, until 1966, did not allow any individual concurring or dissenting opinions.<sup>6</sup>

For a long time these matters were referred to an Appeals Committee of the Privy Council. This Committee had no set procedure, met irregularly and had difficulty attracting the judicial personnel of the Privy Council to its hearings and deliberations. Thus cases were sometimes decided by Privy Councillors with no legal training.<sup>7</sup> As more and more cases came before the Committee, this informality became increasingly unsuitable. A major reform was instituted with the enactment of the Judicial Committee Act of 1833.<sup>8</sup> That statute created the Judicial Committee of the Privy Council which provided for regular sittings and limited its membership to well-qualified judges.<sup>9</sup> With the Appellate Jurisdiction Act of 1876,<sup>10</sup> the membership of the committee became nearly identical to that of the Law Lords of the House of Lords.<sup>11</sup> The result was a dual appeal procedure in which appeals in the United Kingdom and those from overseas colonies and dominions

---

5. D. SWINFEN, *IMPERIAL APPEAL: THE DEBATE ON THE APPEAL TO THE PRIVY COUNCIL, 1833-1986*, at 4 (1987).

6. *See id.* at 18-19, 221-22.

7. *See id.* at 5.

8. 3 & 4 Will. 4, ch. 41 (1833).

9. *See D. SWINFEN, supra* note 5, at 3-8.

10. 39 & 40 Vict., ch. 59 (1876).

11. *See D. SWINFEN, supra* note 5, at 39.

followed substantively similar but technically different routes of review.

It was, of course, inevitable that, as the former colonies began to achieve increasing independence,<sup>12</sup> the retention of a central appellate court in London would begin to chafe. Swinfen's account shows how the question of the appellate jurisdiction of the Privy Council was a recurring, if not constant, theme in the relations between Britain and the emerging dominions of the "old" Commonwealth in the period from the 1870's to the 1930's. While the debate was essentially one of political status, Swinfen also makes clear that continuation of Privy Council appeals raised practical problems. These included the expenses associated with long-distance appeals and the resulting inequality among litigants with differing resources.

The issue arose in one dominion after another. When the Canadian Parliament created the Supreme Court of Canada in 1875, the enabling act contained a clause intended to make the new court's judgments final, even as against most appeals to the Privy Council. The proposal met strong opposition from the legal authorities in London and the Act was saved from disallowance only by a mutually agreed upon interpretation that essentially left the appeal untouched.<sup>13</sup> Similarly the original draft of the Australian Constitution proposed by the Australian constitutional convention of 1898 excluded appeals from the High Court to the Privy Council in constitutional cases. Again the imperial authorities, particularly Joseph Chamberlain, the colonial secretary, resisted and forced a compromise resulting in a much narrower class of constitutional cases being left to the final authority of the Australian courts.<sup>14</sup> Not surprisingly the most sustained and dramatic opposition to imperial appeals arose in that most reluctant dominion, the Irish Free State. Swinfen gives a detailed account of British resistance to Irish judicial autonomy even after it was apparently prepared to concede such power to other dominions. This resistance apparently was caused by a special distrust of the Irish judges' capacity to protect the interests of the Protestant, Unionist minority.<sup>15</sup>

---

12. On the decline of the empire see C. CROSS, *THE FALL OF THE BRITISH EMPIRE, 1916-1968* (1969); D. JUDD & P. SLINN, *THE EVOLUTION OF THE MODERN COMMONWEALTH, 1902-1980* (1982).

13. See D. SWINFEN, *supra* note 5, at 28-45. The continuation of appeals to the Privy Council from Canada had profound and controversial consequences for the developing law on the constitutional distribution of powers between the provincial and federal governments. See P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 373-91 (2d ed. 1985).

14. See D. SWINFEN, *supra* note 5, at 54-70.

15. See *id.* at 88-139.

National sovereignty was bound to prevail. At the Imperial Conference at Westminster in 1926 the Commonwealth was defined as an association of "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs . . . ."<sup>16</sup> And more particularly with respect to the question of the Privy Council, the report of the Conference's Inter-Imperial Relations Committee contained the declaration that "it was no part of the policy of Her Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected."<sup>17</sup>

This policy was given explicit legal effect in the Statute of Westminster, 1931. The statute did not specifically address the question of appeals to the Judicial Committee but it made two changes which were understood to eliminate the legal obstacles to unilateral abolition of appeals by the dominion parliaments. First it repealed the Colonial Laws Validity Act of 1865<sup>18</sup> insofar as it applied to dominion legislation, allowing the dominion Parliaments to pass statutes in conflict with acts of the Westminster Parliament. Second it empowered the Dominions to create legislation with extra-territorial effect, thus reaching appeals in the United Kingdom.<sup>19</sup> Canada and the Irish Free State took almost immediate advantage of this power with Ireland abolishing the appeal in 1933,<sup>20</sup> and Canada abolishing it in criminal cases in the same year.<sup>21</sup>

---

16. E. WADE & A. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 421 (10th ed. 1985) (quoting W. DALE, *THE MODERN COMMONWEALTH* 21 (1983); CMND. No 2768, at 14 (Imperial Conference - Summary of Proceedings) (1926)).

17. D. SWINFEN, *supra* note 5, at 118 (quoting CMND. No. 2768, at 19 (Imperial Conference - Summary of Proceedings) (1926)).

18. 22 Geo. 5, ch. 4 (1931). The Colonial Law Validity Act is found at 28 & 29 Vict., ch. 63 (1865).

19. See D. SWINFEN, *supra* note 5, at 88. These obstacles had been identified in a Privy Council case holding invalid an earlier attempt of Canada to abolish appeals in criminal cases. *Nadan v. The King*, 1926 App. Cas. 482 (P.C.) (Can.).

20. Even after the enactment of the statute, a legal question continued as to whether abolition of the appeal by the Irish Free State was inconsistent with the Anglo-Irish Treaty of 1921. The abolition legislation was held valid in *Moore v. Attorney General*, 1935 A.C. 484 (P.C.) (Ir.). Both the legal and political aspects of the abolition of the Irish appeal are dealt with by Swinfen. See D. SWINFEN, *supra* note 5, at 116-26.

21. See *id.* at 136. Civil appeals were not abolished until 1949, R.S.C. 1949, Second Session, ch. 37, §§ 3, 7, because of doubts about the relative authority of federal and provincial legislatures which were resolved in *Attorney-General for Ontario v. Attorney-General for Canada*, 1947 App. Cas. 127 (P.C.) (Can.).

Elsewhere, however, the countries of the "old" Commonwealth were in less of a hurry. South Africa did not act until the Nationalist party assumed power in 1950.<sup>22</sup> In Australia the appeal was restricted but no action was taken to abolish it until 1975, when appeals from the High Court were ended.<sup>23</sup> Because of domestic political and legal questions, appeals from the state courts were not abolished until 1986, and then only with the help of legislation from the Parliament at Westminster.<sup>24</sup> Although its abolition has been the subject of discussion,<sup>25</sup> the appeal continues intact in New Zealand.<sup>26</sup> Countries of the "new" Commonwealth, on the other hand, have often abolished the appeal immediately upon independence<sup>27</sup> or upon adopting a republican form of government.<sup>28</sup> Although the retrenchment of the Judicial Committee's jurisdiction has been neither rapid nor regular (as the examples cited at the beginning of this review show), it appears to be inexorable.

The decline of the judicial functions of the Privy Council presents an interesting case study in the fading of colonialism and Swinfen gives a careful and thoughtful account of the political tugs and tussles that accompanied that process. The same story, however, may exemplify a somewhat more general issue, one with continuing relevance to live legal and political controversies. The giving way of the great court of the empire may be examined as a microcosm of the difficulties of creating or maintaining any broad system of international adjudication.

In summarizing Swinfen's account of the gradual elimination of appeals to the Privy Council, I have dealt only with half of the subject matter of *Imperial Appeal*. Equally prominent is his description of the repeated attempts, occurring over almost exactly the same period, to replace the Judicial Committee with some other imperial or commonwealth court. That is, as the old system disintegrated, many judges and statesmen in Britain and other parts of the Commonwealth argued against abandoning this kind of legal connection. Various reasons were given. To some, no doubt, the desire stemmed from a mere sentimental

---

22. D. SWINFEN, *supra* note 5, at 160. South Africa had, in fact, held the power to abolish appeals since its creation as a dominion in 1909. *See id.* at 101.

23. Privy Council (Appeals from the High Court) Act, No. 33 (Austl. 1975).

24. Australia Act, 1986, ch. 2.

25. *See, e.g.,* Burns, *The Judicial Committee of the Privy Council: Constitutional Bulwark or Colonial Remnant*, 5 OTAGO L. REV. 503 (1984).

26. *See* D. SWINFEN, *supra* note 5, at 167.

27. *See, e.g.,* Abolition of Privy Council Jurisdiction Act, Constituent Assembly, No. 5 (India 1949).

28. *See* D. SWINFEN, *supra* note 5, at 167-72.

attachment to the Empire.<sup>29</sup> A more practical consideration, which probably maintains some influence, is the perceived paucity of legal talent, especially in the developing countries of the "new" Commonwealth, and the difficulty of assembling a sufficiently qualified appellate court.<sup>30</sup> But for others the maintenance of the Privy Council appeal was a means of strengthening a worthwhile link among legal systems that shared certain cherished assumptions and values, usually referred to as a common heritage of the "rule of law".<sup>31</sup> This idea was connected with a vision of the Commonwealth as a league of independent states committed to certain overriding principles - that is, as an international organization.

Naturally these proposals did not seek to maintain the Judicial Committee in exactly the form in which it had existed. It would have to be modified to eliminate the artifacts of colonialism. The predominance of British judges would have to end. The manner of selecting the judges would have to be shared among the various member nations. The Court itself would probably have to be peripatetic, sitting in various parts of the world, perhaps in regional benches.

The persistence of proposals of this kind is remarkable especially in light of their continued failure to be taken seriously. The possibility of a new court was raised as early as 1900 by Joseph Chamberlain (with some assistance by R.B. Haldane, later a prominent Law Lord and member of the Judicial Committee) in response to Australian resistance to maintaining the Privy Council appeal.<sup>32</sup> It appeared again in 1929 during the debate on the abolition of the appeal from the courts of the Irish Free State. This time it was suggested that a Commonwealth tribunal be established, not to entertain general appeals from local courts, but to resolve disputes among the members of the

---

29. In 1875, when the Liberal Government in Canada introduced in the Canadian Parliament its Supreme Court Act eliminating appeals to the Privy Council, the leader of the Conservative opposition, former Prime Minister John A. MacDonald, denounced it: "Those who disliked the colonial connection spoke of it as a chain, but it was a golden chain, and he for one was glad to wear the fetters." D. SWINFEN, *supra* note 5, at 30 (quoting *Debates of the Dominion Parliament*, 980-81, 23 February 1875).

30. *See id.* at 213.

31. *See, e.g., id.* at 211-13.

32. *See id.* at 62-64. The same proposal was renewed by the Australians themselves at subsequent Imperial Conferences in 1907, 1911, and 1918. *See id.* at 68-73. Swinfen says that "[o]ne may very well doubt whether, apart from Australian championship and the single, hastily withdrawn offer from Chamberlain, the issue had ever been alive. From 1901 onwards, the attitude of Britain and of the other Dominions was at most apathetic and usually frankly hostile." *Id.* at 73.



Commonwealth. Even this restricted proposal raised little enthusiasm.<sup>33</sup> A flurry of proposals appeared in the 1960's and were supported by prominent legal officials in Britain. It is no coincidence, as Swinfen notes, that these plans were raised simultaneously with the debate on the entry of the United Kingdom into the Common Market. The Commonwealth was regarded by opponents of that step as a natural international alternative.<sup>34</sup> None of these proposals, no matter how earnestly pressed, came close to being enacted.

To some extent the obstacles were practical. A London-based court would smack too much of colonialism and would remain remote and hard to deal with in the rest of the Commonwealth. A traveling court or regional benches would create enormous logistical problems and expense.<sup>35</sup> Support in Britain was hampered by the recognition that, if the adhering states were really to be on an equal level, the new court would have to replace, or hear appeals, from the House of Lords. Although some proponents accepted this possibility in the 1960's, it was a prospect which many British lawyers could not stomach.<sup>36</sup> But this reluctance exemplifies the more profound flaws in the suggestions for a Commonwealth court; their failure to account for attitudes toward law present not only in Great Britain, but in the rest of the Commonwealth as well.

Continuation of any form of an international Commonwealth court was doomed because it was inconsistent with new, prevailing assumptions about the nature and sources of law. The same difficulties, therefore, are bound to beset any attempt to establish an international court, that is, one in which judicial personnel from without are empowered to adjudicate rights and liabilities within an effective national legal system. The arguments for a reformed Commonwealth court were usually fairly vague, most often stressing the desirability of maintaining the link of empire. But the proponents necessarily presupposed certain common beliefs about the kind of law that such a tribunal would apply. Most often those beliefs were phrased no more specifically than by ref-

---

33. See *id.* at 102-13. Most of the larger Commonwealth countries had entered reservations to their adherence to the treaty creating the International Court of Justice in 1929 excepting disputes with other members of the Commonwealth. This was, at least on the part of Britain, partly to forestall litigation at the Hague involving the status of Ireland under the Anglo-Irish Treaty of 1921. *Id.* at 199.

34. See *id.* at 185-86.

35. See *id.* at 196-97, 201-06.

36. See *id.* at 67-68, 78-79, 183-84. Later proposals conceding that British appeals would have to be included in the new court's jurisdiction are discussed in *id.* at 187-218.

erences to the "rule of law," a concept extravagantly praised<sup>37</sup> but rarely defined. Some advocates referred especially to the shared attachment to the common law,<sup>38</sup> an outlook which ignored, for example, the Islamic law of Pakistan<sup>39</sup> or the civil law of Quebec.<sup>40</sup> It was imagined that the Commonwealth court would draw on the best legal talent available, that its judges would be world-class experts in the interpretation of law.<sup>41</sup> But that also presupposed the existence of some body of knowable material, something in which the judges might be expert. Indeed, one finds among the statements of those favoring the creation of the new court arguments based on the need for one "wisest single exponent of scientific law."<sup>42</sup>

Looking back from our viewpoint at the end of the century, these attitudes appear fundamentally, if touchingly, naive. In connection with any form of international adjudication, they necessarily entail the unstated assumption that some kind of binding law exists independently of the law-making authorities of the states in which it is applied. But we can now see that by the time these expressions were being uttered, the view of law on which they were based had been irretrievably lost. That is, positivism had carried the day. Justice Holmes's response to the contrary view on the nature and sources of the common law summarizes the now prevailing view:

It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court. . . . But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it to-day does not exist without some definite authority behind it.

---

37. See, e.g., *id.* at 198 (quoting Senator Cooray of Ceylon telling the 1960 Prime Ministers' Conference in London that the rule of law was "the finest legacy which Great Britain has left to the many countries she has nurtured into independence." Cooray, *A Commonwealth Court*, 1962 J. PARLIAMENTS COMMONWEALTH). See also *id.* at 196, 211.

38. See *id.* at 196, 212-13.

39. See *id.* at 214 (discussing remarks of Pakistani delegate to Sydney Commonwealth Conference of 1965).

40. See F. SCOTT, *ESSAYS ON THE CONSTITUTION* 32 (1977). Ironically, much of the support within Canada for maintaining the appeal to the Privy Council came from Quebec where some people saw it as a protection of minority rights within the dominion. See D. SWINFEN, *supra* note 5, at 107.

41. See D. SWINFEN, *supra* note 5, at 191, 212-13.

42. *Id.* at 181 (quoting speech of Hector Hughes in the House of Commons on November 3, 1953).

The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State. . . .<sup>43</sup>

Adopting this view, the idea that the law of an independent state could somehow be discovered by expert, scientific judges poring over ancient books in a court thousands of miles away was, at some level, preposterous. Even with respect to enacted law, modern jurisprudence has come to believe that interpretation is at most a subjective and at least an imprecise process<sup>44</sup> and that the authority that makes any interpretation controlling must be authority vested by the state in the Court that pronounces it. Making law in general, and adjudication in particular, has come to be seen as an inseparable attribute of sovereignty.<sup>45</sup> The nature of the Commonwealth as an association of sovereign states had been irreversibly settled in the 1920's and 1930's. It followed that making law for each state was within the authority of that state alone and it was unlikely that such an essential power was about to be delegated to some international panel of "experts."<sup>46</sup>

It seems clear that exactly the same dilemma attends the persistent, yet only partially successful, attempts to create new forms of international adjudication. It is, therefore, no surprise that the jurisprudence of international law has been decidedly unsympathetic to legal positivism and is, indeed, one of the last bastions of "natural law" thinking.<sup>47</sup> To that extent, it denies what seems to be an axiom of the modern understanding of law - that legal systems and law-makers are logically, if not always historically, prior to law. We recognize law as the creation of human beings, who for one reason or another, are re-

---

43. *Black & White Taxi Cab & Transfer Co. v. Brown & Yellow Taxi Cab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J. dissenting).

44. See H. HART, *THE CONCEPT OF LAW* 122-24 (1960).

45. This fundamental difficulty surfaced regularly in the debates on the proposals for a Commonwealth Court of Appeal. See, e.g., D. SWINFEN, *supra* note 5, at 214-15 (quoting remarks of Chief Justice Gajendragadkar of India at the Commonwealth Law Conference in Sydney in 1965).

46. Thus the proponents of a Commonwealth court were sometimes torn between their desire for judicial quality and their recognition that the choice of judges would, at least in part, have to be in the hands of the various political authorities. See *id.* at 202-03.

47. See, e.g., Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 951 (1961); Walsh, *Commentary*, 2 CONN. J. INT'L L. 381 (1987). For a discerning examination of the difficulties of reconciling much international law with positivism, see Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L. J. 61 (1984). See also M. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 163-69 (1988).

garded as legitimate sources of law. What constitutes legitimate sources must be a political and, therefore, a time and place-bound matter.<sup>48</sup> For law-making power of the broad and strong kind that is sought for international tribunals, those sources have, for a long time, been almost invariably identified with the state.<sup>49</sup>

This is not at all to say that an international system of adjudication is impossible. We have many examples to the contrary. But so long as the state remains the principle source of law we have to expect the authority of such international tribunals to be conferred by those states. So long as the political authorities in the states continue to sanction such international law-making it will be an effective source of law. It will, in those circumstances, be sensible to regard it as the exercise of a delegated power. But, if social and political conditions are right, such a court and the sources of law on which it relies may come to be accepted as legitimate in their own right, and a new and independent legal system will have come into being. Something like this may be happening now in Europe with respect to the law of the European Economic Community<sup>50</sup> and the protection of human rights under the European Convention on Human Rights.<sup>51</sup> Perhaps we can now look back at the creation of a single federal legal system in the United States in the same way.<sup>52</sup> The development of such a new legal system will occur

---

48. The criteria for recognition of a legitimate law-maker can be complex and imprecise. But those criteria are prior to law and can usefully be regarded, at least by the external observer, as not themselves rules of law. See H. HART, *supra* note 44, at 107-08.

49. This does not mean that it is useless to talk of non-state created law. That may be a helpful way of explaining the attitudes and behavior connected with various forms of non-state ("private") associations. These other legal systems may exist within the jurisdiction of a state legal system sometimes conflicting with, but often coexisting with, the state system. See Weisbrod, *Family, Church and State: An Essay on Constitutional and Religious Authority*, 27 J. FAM. L. — (1988). In the same way, we could have a transnational or international legal system coexisting with the domestic state systems. But to call any of these phenomena systems of law, some kind of acceptance of the legitimacy of the law-maker must exist within the relevant population. See *infra* notes 50-53 and accompanying text.

50. See Jones, *The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and Legal System*, 17 CORNELL INT'L L. J. 1 (1984).

51. See *Conference on International Courts and the Protection of Human Rights*, 2 CONN. J. INT'L L. 261 (1987). Another way of stating this critical transition is to identify the point at which national compliance with internationally created rules ceases to be a matter of policy and becomes one of perceived obligation. See H. HART, *supra* note 44, at 79-88.

52. Whether or not the United States was merely the delegate, for limited purposes, of the individual states might be thought to have remained an open question until the Civil War. Certainly the states' rights arguments of the antebellum period and the justifications for secession assumed that ultimate and supreme law-making power was in the states. See H. HYMAN & W. WIECKEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 211-13 (1982).

only when broad political agreement emerges both as to substantive values informing the lawmaker and the quality of the lawmaker itself.<sup>53</sup> To support some form of international legal system, such agreement must override the modern predisposition to suspect any kind of authority originating outside the boundaries of the nation-state.

Given these criteria, the failure of the plans to establish a Commonwealth legal system appears to have been inevitable. Those proposals consisted of attempts to forge a political attitude that valued international legal authority at the very time national sovereignty and independence were the dominant political ideas in the societies which would be affected. All of the talk about a common legal tradition and heritage was nothing in comparison with the centrifugal political forces of that period. The nations of the Commonwealth did, indeed, share a common history and experience. But it was the history and experience of colonialism, a legacy unlikely in the 1960's to provide the kind of foundation on which a new system of law might rest. The transnational attitudes required to create such a system must be rooted in beliefs which can prevail, at least within some limited area, over the social conviction that no outsiders have the wisdom or right to make law. The Privy Council and the Commonwealth Court of Appeal could draw only on values which were everywhere being rejected.

---

53. See Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57, 60-61 (1987).